Keith McCoy

Director, Environmental Quality

Resources, Environment and Regulation Policy

National Association of Manufacturers

August 28, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Sir or Madam:

The Business Network for Environmental Justice (BNEJ) is pleased to submit comments regarding the U.S. Environmental Protection Agency's (EPA) "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (Investigation Guidance). The BNEJ is a voluntary organization, based at the National Association of Manufacturers, of industry and industry trade associations interested in environmental justice issues. We believe that all people should be treated fairly under the laws, including environmental laws, without discrimination based on race, color or national origin.

In many respects, EPA's Investigation Guidance represents a substantial improvement over EPA's 1998 Interim Guidance. We commend EPA for the outreach, public participation, and stakeholder dialogue effort that has occurred over the last two years, including the intensive work that went into the Title VI Federal Advisory Committee Act ("FACA") process.

The BNEJ is pleased to see that the draft of the revised investigation guidance is based on principles with which we agree: 1) All persons are entitled to a safe and healthful environment; 2) Strong civil rights enforcement is essential; and 3) Enforcement of civil rights laws and environmental laws are complementary, and can be achieved in a manner consistent with sustainable economic development.

Unfortunately, the draft revised investigation guidance does not provide the predictability and certainty that is crucial to any effective environmental-permitting process. Therefore, the BNEJ concludes that the Investigation Guidance is still in need of substantial revision.

The BNEJ comments focus on three major areas posed by the Investigation Guidance:

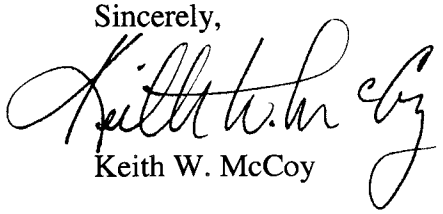
- Title VI was never intended to guarantee equal results or to prohibit all unintentional "disparate impacts" that yield unequal environmental results.

- The proposed process for investigating Title VI complaints does not provide a predictable basis for determining which "disparate impact" situations actually violate the law.

- The proposed process should be made fairer to the community, the recipient and the permittee.

The BNEJ is committed to working with the EPA and other stakeholders, and we believe the BNEJ can bring significant experience and expertise to the table. We appreciate this opportunity to comment, and look forward to significant further dialogue on this very important issue.

Sincerely,



Keith W. McCoy

Comments of the Business Network for Environmental Justice
On EPA's Draft Title VI Investigation Guidance Document

The Business Network for Environmental Justice is pleased to submit the following comments on the U.S. Environmental Protection Agency's "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)," *65 Fed. Reg. 39,650* (June 27, 2000).

The Business Network for Environmental Justice

The Business Network for Environmental Justice (BNEJ) was formed in 1995. It is a voluntary organization of businesses, corporations, industry trade associations, industry service providers and business groups interested in environmental justice issues. The BNEJ believes all people should be treated fairly under all laws, including environmental laws, without discrimination based on race, color or national origin. We support open and informed dialogue with citizens about environmental decisions that affect local communities. We also support continued sound scientific research into factors affecting human health and the environment, and the use of scientifically sound risk assessments in evaluating and prioritizing health and environmental risks. Appendix A lists the organizations and companies that are members of the BNEJ and ascribe to these comments.

Executive Summary of the BNEJ's Comments

The BNEJ supports the many substantial improvements in the Investigation Guidance from the 1998 Interim Guidance. The BNEJ also commends the EPA for the outreach, public participation and stakeholder dialogue effort that is reflected in the Investigation Guidance.

Despite these improvements, the BNEJ has reluctantly concluded that the Investigation Guidance is still in need of substantial revision. As is, the Investigative Guidance will not provide the predictability and certainty that are absolutely essential for all stakeholders.

While, the BNEJ believes all people should be treated fairly under all laws, including environmental laws, without discrimination based on race, color or national origin; this does not mean that all persons can be guaranteed identical environmental results. As a practical matter, this is impossible. The guidance should be revised to reflect this truism, which appears in the applicable Supreme Court precedent. In fact, the Investigation Guidance should be revised to identify the legal precedent for the various interpretations of Title VI that are reflected in it. Without this specificity, the Guidance suffers from many of the flaws that plagued the 1998 Interim Guidance. No one will be able to predict which impacts are unlawful, based on the Investigation Guidance.

In evaluating complaints and determining whether to conduct investigations, the BNEJ recommends that the final Investigation Guidance --

- focus OCRs limited investigative resources on state permitting programs, not on individual permits;

- alternatively, if any specific permit actions are allowed to trigger Title VI investigations, further limit investigations to permit actions that authorize a significant net increase in emissions of concern that cause a significant adverse impact;

- narrow the scope of impacts considered to those that are actually within the legal authority of the permitting agency;

- limit analysis to “significant adverse” impacts;
- clarify how OCR will attempt to identify the “affected” population; and
- acknowledge the difficulties involved, in and clarify the approach to, defining an “appropriate” comparison population.

To make the investigation process fairer to all stakeholders, the BNEJ recommends that the final Investigation Guidance:

- require that complaints be filed by persons with a genuine stake in the community;
- recognize the role of the permittee in the investigation;
- require complainants to exhaust their administrative remedies in the permit process;
- require the use of data and analytic methods of acceptable quality;
- articulate a broader and more flexible view of justification;
- avoid using the “less discriminatory alternative” concept to undermine the scope of potential justifications;
- avoid encouraging “informal resolution” of Title VI complaints that may not have any merit in the first instance;
- clarify the timelines set forth for investigation and resolution of complaints; and
- require fairness in the remedy for any Title VI violation.

These measures are needed to ensure fairness and reasonable predictability in the Title VI process. The BNEJ hopes that these comments will contribute to the multi-stakeholder process and assist the agency in its efforts to better implement its Title VI regulations.

Introduction

Although the Investigation Guidance is not a rule, and cannot unreflectively be relied upon by EPA's Office of Civil Rights (OCR) as if it were a rule, it has clearly benefited from the rigors of the notice-and-comment process EPA has conducted. Among the major substantive improvements are the following:

- recognizing that permits requiring significant decreases in relevant emissions should not trigger Title VI investigations, and thus indicating that complaints triggered by such permits will be dismissed;

- recognizing that permit modifications on administrative issues should not trigger Title VI investigations, and thus indicating that complaints triggered by such permit modifications will be dismissed;

- encouraging the exhaustion of administrative remedies during the permitting process;

- recognizing that Title VI investigations should be limited to those stressors and impacts that are within the recipient's legal authority to consider in the permitting process;

- limiting Title VI investigations to impacts that are significantly adverse because they exceed a recognized significance level;

- requiring Title VI investigations to be based on valid and reliable data;

- allowing recipients to demonstrate their justifications for disparate impacts prior to any finding of non-compliance; and

- recognizing that recipients' justifications may be based on the environmental or public health benefits of facilities, or on broader interests such as economic development.

Additionally, the Investigation Guidance rests upon a set of guiding principles, derived largely from the Title VI FACA process, most of which are sound, even if

they are not applied consistently in the Investigation Guidance.[1]

Despite these improvements, the BNEJ has reluctantly concluded that the Investigation Guidance is still in need of substantial revision. It will not provide the predictability and certainty regarding environmental permits that are absolutely essential for all stakeholders.[2]

In this respect, the Investigation Guidance still suffers from some of the same flaws that characterized the 1998 Interim Guidance. One recent commentator summarized those flaws as follows:

> The Interim Guidance adopts a reactive strategy that promotes uncertainty for all involved. Instead of defining clear standards about which facilities and operations will be allowed in which communities, the Interim Guidance encourages ad hoc challenges to proposed or existing environmental permits. The results are: (1) affected communities and other environmental justice advocates are always reacting to specific projects, rather than proactively establishing clear standards to protect their communities; (2) the momentum of an existing or even proposed facility can be difficult to stop; (3) state permitting agencies and facility owners/operators face substantial uncertainty about whether a proposed activity will be found to have an impermissible disparate impact . . . ; and (4) a facility owner/operator can invest substantial amounts in a particular facility (including an established, long-permitted facility) and/or permit application

---

1 For example, one of EPA's principles endorses early steps "to prevent potential Title VI violations and complaints." *65 Fed. Reg. at 39,669*. The BNEJ believes that such efforts are best undertaken "through voluntary initiatives by industry," rather than pursuant to direct or indirect governmental compulsion, even though BNEJ recognizes that actions of permittees may neither cause nor redress many of the concerns that animate Title VI complaints. Any state programs aimed at preventing Title VI violations should reflect the actual contributions of industrial sources to any impacts of concern, as well as any efforts made by those sources to eliminate or mitigate such impacts. As discussed below in Part I, however, the Investigation Guidance appears to adopt as a guiding principle a mistaken understanding of the purposes of Title VI. This mistaken understanding was not derived from the FACA process or its recommendations.

2 In fact, the Investigation Guidance, in its current form, seems likely to disrupt some of the most innovative and promising regulatory programs now in existence, by undermining the level of predictability and certainty available to the community and to the permittee. For example, EPA's cap-and-trade marketable emission permit approach developed for interstate ozone transport may be vulnerable to a Title VI challenge if EPA were to adopt the theory of discriminatory effects articulated in the Investigation Guidance. EPA should not jeopardize its most promising environmental programs – which may achieve better environmental results much more quickly and at substantially lower costs – unless such a result is absolutely necessary, which the BNEJ does not believe is the case.

only to have it unpredictably investigated and rejected ….

Craig Arnold, *Land Use Regulation and Environmental Justice*, 30 Env'tl L. Rptr. (ELI) 10395, 10397-98 (June 2000).

The BNEJ believes that these comments aptly describe the situation under the Investigation Guidance, as well. For that reason, we urge substantial further revisions as described in these comments before EPA issues the Investigation Guidance in final form.[3]

BNEJ COMMENTS

I. EPA Should Acknowledge That Title VI Was Not Intended to Guarantee Equal Environmental Results.

Although the Investigation Guidance does provide somewhat greater clarity than did the 1998 Interim Guidance as to OCR's interpretation of "disparate impacts," one consequence of that clarity is to highlight just how far the Guidance would expand the meaning of "discrimination" beyond the intended reach of Title VI. We first address this legal issue before turning to the specifics of the Investigation Guidance.[4]

Nothing in Title VI or its legislative history suggests that Congress ever imagined this civil rights law would be used to prohibit unintentional disparities in environmental quality. Nor did EPA originally interpret Title VI in such sweeping terms. Certainly, when EPA issued its Title VI regulations in 1973, it gave no indication that it would construe Title VI to prohibit unintentional disparities in environmental quality. 38 *Fed. Reg*. 17,968 (1973).

---

[3] That these comments do not address EPA's Draft Recipient Guidance should not be taken as an endorsement of that draft Guidance. For just one example, the suggestion for "area-specific approaches" could have numerous adverse effects for the identified areas, including but not limited to discouraging businesses from locating in those areas, discouraging beneficial changes to existing facilities (including their pollution control equipment) that would trigger permit modifications, and encouraging the filing of frivolous Title VI complaints.

[4] This legal issue is addressed in much greater detail in Thomas A. Lambert, *EPA's "Revised Guidance" for Implementing Title VI: Environmental Justice on a Faulty Legal Footing,* Policy Brief 206 (Center for the Study of American Business) (July 2000), a copy of which is attached.

Somewhere between 1973 and 1998, when EPA issued its Interim Guidance, EPA apparently came to a different understanding of Title VI and expanded the meaning to include a prohibition on unintentional disparities in environmental quality.[5] In the Investigation Guidance, EPA cites various legal authorities as support for this new interpretation of its authority to issue regulations effectuating Title VI. As we show below, these authorities cannot bear the weight that EPA asks them to support.

In fact, the Investigation Guidance appears to adopt an interpretation of Title VI that is in conflict with Supreme Court decisions. "EPA generally would expect the risk or measure of potential adverse impact for affected and comparison populations to be similar under properly implemented [state environmental] programs, unless justification can be provided." 65 *Fed. Reg*. at 39,682. This statement suggests that, if EPA finds disparities in the distribution of risk, those disparities alone demonstrate unlawful discrimination. This is inconsistent with the Supreme Courts understanding of "disparate impact" discrimination that EPA's Title VI regulations prohibit.

A. Title VI Was Not Intended To Guarantee Equal Results for All Persons.

A useful indication of the limited scope of Title VI comes from the Supreme Court's unanimous decision in *Alexander v. Choate*, 469 U.S. 287 (1985). The Court held that section 504 of the Rehabilitation Act – which was patterned on Title VI[6] – did not require the state to implement its Medicaid program to guarantee equal results -- equal health – for all persons. As applied to a state's environmental permitting program, Title VI does not provide a guarantee of equal results -- equal environmental conditions – for all persons. Conceptual confusion exists in the Investigation Guidance from EPA attempt to use Title VI to address unequal environmental results that are "caused" by a funding recipients' authorization of permitted activities, but which do not reflect discrimination by the funding recipient (or permittee).

To understand this point, consider the facts of *Alexander v. Choate*. The plaintiffs

[5] One need only examine the environmental justice materials posted on the Web sites of several different EPA regional offices to realize that considerable confusion and uncertainty exists in this area.

[6] Interpretation of section 504 is directly relevant to ascertaining the meaning and scope of Title VI, and vice-versa. 469 U.S. at 293 n.7, 295 n.13.

in that case were Medicaid recipients living in Tennessee. On behalf of handicapped individuals, they challenged Tennessee's proposed reduction -- from 20 days to 14 days -- of the length of inpatient hospital care annually covered by its state Medicaid program. Plaintiffs claimed that the proposed reduction would have a disparate impact on handicapped users of Medicaid.

In support of their discrimination claim, plaintiffs demonstrated that the proposed reduction would actually affect handicapped persons differently than non-handicapped persons. They showed that 27.4 percent of handicapped users of Medicaid required more than 14 days of inpatient hospital care, while only 7.8 percent of non-handicapped users required more than that number of days of such care. 469 U.S. at 289-90. The plaintiffs prevailed at trial, and again on appeal to the Sixth Circuit, which "apparently concluded that any action by a federal grantee that disparately affects the handicapped states a cause of action." 469 U.S. 291. The Supreme Court reversed.

The Supreme Court rejected the notion that a difference in impact necessarily amounts to a prima facie case of discrimination. As the court put it, "we reject the boundless notion that all disparate-impact showings constitute prima facie cases." 469 U.S. 299. In essence, the court held that it is not enough to prove that a challenged action causes a disparity of impacts. The plaintiff must also demonstrate that the disparity is discriminatory in some relevant way. This demonstration can be made either by referring to an appropriate comparison group of persons entitled to the same results but actually receiving better results – thereby providing an inference of discrimination -- or by demonstrating that the disparity was the result of conscious or unconscious intentional discrimination.[7]

To make this point even clearer, the Court noted that the benefit provided by state Medicaid programs was not intended to be "adequate health care." 469 U.S. 303. Instead, the benefit offered was a particular package of health care services. The Court then held that federal civil rights law "does not require the State to alter this definition of the benefit being offered simply to meet the reality that the

[7] If the disparity results from intentional discrimination, it also violates the Equal Protection Clause of the Fourteenth Amendment. Unlike for Section 504 and Title VI, the Supreme Court has clearly held that the Equal Protection Clause is limited to intentional discrimination and does not address "disparate impact" discrimination proved solely by comparing results. *See Washington v. Davis,* 426 U.S. 229 (1976). But even for intentional discrimination, the Court has repeatedly stressed that the "settled rule" is "that the Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 273 (1979).

handicapped have greater medical needs." 469 U.S. at 303. *The law "does not . . . guarantee the handicapped equal results from the provision of state Medicaid .... Tennessee is not required to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users*." 469 U.S. 305-06 (emphasis supplied). Because the handicapped still had "meaningful and equal access" to the package of benefits offered by the state Medicaid program, Tennessee had not violated the "disparate impact" discrimination prohibition that the Court assumed was a permissible interpretation of Section 504 of the Rehabilitation Act.

In summary, a funding recipient's environmental permitting program does not violate Title VI simply because one community or one group of persons is not provided with "equal results" in regard to human health risks or environmental risks as compared to another community or group of persons. So long as all persons receive fundamentally the same benefits and services -- the particular package of environmental protection laws that the recipient's program provides -- there is no unlawful "discrimination" to address.

B. EPA Has Identified No Legal Precedent To Support Its Current Interpretations of Its Title VI Authority.

The Investigation Guidance cites various legal authorities in support of the many interpretations of Title VI reflected in the Investigation Guidance. But none of these authorities actually supports the principles for which the Guidance cites them.

For example, EPA quotes the Supreme Court's statement that Title VI

> delegated to the [federal funding] agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander v. Choate, 469 U.S. at 293-94 (1985).

This passage does not support various provisions of the Investigation Guidance, which we discuss in Part III.D. below. Those provisions would target various adverse impacts for investigation, without regard to whether those impacts were actually caused by the funding recipient's permit program. First, EPA has made no

"complex determination" regarding which environmental impact disparities are either "sufficiently significant social problems" or "readily enough remediable" to warrant interpreting its existing Title VI regulations to extend to such impacts. Second, EPA could not make such findings in regard to many environmental impact disparities, as the quoted language focuses on practices of federal grantees that had *produced* the relevant impacts. This means that only impacts that are *caused* by the recipients of federal funding should be evaluated by the funding agency. Although, as we discuss in Part II.C. below, the Investigation Guidance properly limits investigations to impacts that are cognizable by the recipients' permit program, it fails sufficiently to limit investigations to actual and significant impacts that are caused by the permitted activities, as we discuss in Part II.B. below.

Similarly, the other legal authorities that EPA cites do not and plainly cannot expand Title VI beyond its limits in order to guarantee equal environmental results for all communities and persons. These other materials are Executive Branch and administrative agency materials, which cannot overturn binding Supreme Court interpretive precedent. For example, EPA cites the July 14, 1994,memorandum from Attorney General Janet Reno on the disparate impact standard under Title VI. Tat four-paragraph memorandum offers no definition of "disparate impact," much less a definition tailored to the context of environmental permitting by state agencies. Certainly nothing in the Reno memorandum suggests that Title VI mandates the creation of equal environmental conditions for all persons.

Similarly, EPA cites Executive Order 12,250, which gives the Department of Justice a coordination role in the overall federal enforcement effort under Title VI. But that Executive Order provides no definition of "disparate impact," much less a definition suited to the particular circumstances of environmental permitting by state agencies. Nor does the Executive Order even hint that Title VI mandates the creation of equal environmental conditions for all persons.

EPA also cites regulations issued in 1976 by the Department of Justice as authority for issuing its Investigation Guidance. Those 1976 regulations say nothing, however, about the content of the Title VI regulations or guidelines to be issued, and thus they offer no support for EPA's approach to finding disparate impacts in the Investigation Guidance.[8]

[8] The BNEJ notes that each federal agency that implements Title VI was required by these 1976 DOJ regulations to "develop a written plan for enforcement which sets out its priorities and procedures" and to make that written plan "available to the public." 28 C.F.R. § 42.415 (1999). The BNEJ is unaware that EPA

In sum, Title VI was never intended to guarantee equal environmental results for all communities or for all persons. EPA should frankly acknowledge this in its final Investigation Guidance and should focus its efforts on identifying those disparate impacts that actually violate the law.

I. EPA Has Not Presented in the Investigation Guidance a Predictable Process for Deciding Which Disparate Adverse Impacts Amount to Discrimination That Violates Title VI.

Because the Investigation Guidance attempts to interpret Title VI to guarantee equal environmental results, it necessarily suffers from many of the same flaws associated with the 1998 Interim Guidance. Perhaps the most fundamental flaw in the Investigation Guidance is the lack of a predictable process for OCR to use in determining which disparate impacts actually violate Title VI and which do not. Simply stated, no one -- not the permittees, not the recipients and not the communities -- will be able to predict which impacts are unlawful based on the Investigation Guidance. The BNEJ recommends that the final Investigation Guidance should, among other things:

- focus OCRs limited investigative resources on state permitting programs, not on individual permits;
- alternatively, if any specific permit actions are allowed to trigger Title VI investigations, further limit investigations to permit actions that authorize a significant net increase in those emissions of concern that cause a significant adverse impact;
- narrow the scope of impacts considered to those that are actually within the legal authority of the permitting agency;
- limit analysis to "significant adverse" impacts;
- clarify how OCR will attempt to identify the "affected" population; and

---

has developed such a plan or has made any such plan public.

- acknowledge the difficulties involved in and clarify the approach to defining an "appropriate" comparison population.

We address each of these issues in turn.

A. OCR's Limited Investigative Resources Should Focus on State Permitting Programs, Not on Individual Permit Actions.

The BNEJ believes that many of the substantive and procedural concerns raised by the 1998 Interim Guidance, and revived by the new Investigation Guidance, stem from EPAs decision to focus OCR's limited investigation resources on individual permit actions, as opposed to state permitting programs. The BNEJ seriously questions EPAs decision to establish an investigation process based on the assumption that complaints should be triggered by individual permit actions, given EPA's recognition that: (1) individual facility permits are "rarely" the sole cause of disparate adverse impacts, 65 *Fed. Reg*. at 39,669, 39,683; and (2) the Title VI complaints EPA has received to date have focused on a wide range of issues, including alleged *patterns* in siting or permitting decisions, 65 *Fed. Reg*. at 39,668. Complaints alleging discrimination in the states administration of its permitting program may be filed at any time, without artificially linking them to specific permit actions as "trigger" events.

The point here is not that the individual permit actions and permitted activities are immune from scrutiny -- they are not -- but rather that they typically will not be the primary basis for a claim of disparate impact discrimination. Accordingly, the BNEJ strongly recommends that EPA substantially revise its approach and issue a final Investigation Guidance that focuses primarily on state permitting programs, not on individual permit actions.

B. Alternatively, Only Permits Allowing Significant Net Increases in Emissions That Cause Significant Adverse Impacts Should Be Able To Support Title VI Complaints.

Under the approach taken in the draft Investigation Guidance, the very first step in the disparate adverse impact analysis is to determine the type of permit action involved and assess whether that permit action may have contributed to the alleged disparate adverse impact. 65 *Fed. Reg*. at 39,677. This is an important aspect of the analysis, because it should screen out those permit actions that are unlikely to

create disparate adverse impacts.

As noted above, EPA clearly recognizes that individual permits are "rarely" the sole cause of disparate adverse impacts. 65 *Fed. Reg*. 39,669, 39,683. In light of this recognition, even if EPA retains its current focus on individual permit actions, the best use of OCR's limited resources would be to focus its investigations on complaints stemming from those permit actions that at least appear likely to play a major part in disparate adverse impacts.

1. Only Permits Authorizing Actual Significant Net Emissions Increases That Cause Significant Adverse Impacts Can Be Considered Triggers for Title VI Investigations.

The only categories of permit actions that potentially could be considered to trigger a Title VI complaint are permit issuances, renewals or modifications that authorize an actual, significant net *increase* in emissions of "pollutants of concern," which in turn cause significant adverse impacts. (These pollutants and adverse impacts in the relevant media[9] can be identified either by the complainant or by EPA.) Whether or not any particular permit action actually contributes to a disparate adverse impact that reflects discrimination, of course, will depend upon the facts and circumstances of each case. For any permit action that does not authorize a significant net increase in any pollutant of concern, however, or that does so but does not cause a significant adverse impact, EPA should recognize the same "safe harbor" that it has already recognized for "significant decrease" permits. 65 *Fed. Reg*. at 39,677; see infra Section II.D (discussing the limitation on Title VI investigations to significant adverse impacts).

To better understand this point, consider permits issued in attainment areas for criteria air pollutants under EPA's prevention of significant deterioration ("PSD") regulations issued pursuant to the Clean Air Act. EPA's PSD regulations prevent increases in emissions that would adversely affect attainment of the relevant human health or environmental protection benchmark levels, which otherwise could result from changes in operations of major sources. Issuance, renewal, or modification of a major source's permit that results in increased emissions of the applicable criteria

[9] If the complaint alleges discrimination on the basis of VOCs in *ground water*, for example, a permit that authorized increased *air emissions* of VOCs should not support an investigation or a finding of noncompliance.

pollutant can occur only under these conditions, which necessarily will deem the increased emissions to be sufficient to protect human health and the environment. Nothing more is or should be required of the major source, as Title VI does not require equal environmental results. In contrast, applying Title VI in a manner that would prevent emissions increases in specific locations even though the increases are permitted by the PSD regulations would result in unequal and unfair application of a law that Congress enacted after Title VI. Thus, EPA should limit its investigations to permit actions that authorize significant net increases in emissions that cause significant adverse impacts.

Further, it is important to recognize that an increase in emissions must be actual, not just potential, for a permit action to support a Title VI complaint. It is possible to measure actual emissions increases by comparing “actual to actual” emissions, and it is possible to predict actual emission increases by comparing “potential to potential” emissions. EPA should not attempt to base its Title VI evaluations on potential increases in emissions, as determined by the “actual to potential” test EPA relies on in the Clean Air Act New Source Review program. Use of an “actual to potential” test would generate apparent emissions increases that are not real, and thus could result in EPA finding Title VI violations where none exist.

2. Minor Permit Modifications on Administrative Issues Are Properly Excluded by the Investigation Guidance.

The BNEJ supports EPA's proposed treatment of certain minor permit modifications. According to the Investigation Guidance, "[m]odifications, such as a facility name change or a change in a mailing address, that do not involve actions related to the stressors identified in the complaint, generally will not form the basis for a finding of noncompliance and will likely be closed." 65 Fed. Reg. at 39,677. The BNEJ also endorses this "safe harbor" provision for administrative issues. Finding a "safe harbor" here makes sense, because there is no change in the facility's operations or emissions that would create an impact on the community. The change is merely administrative.

3. "No Emissions Increase" Permit Renewals Also Should Be Excluded.

The BNEJ does not endorse EPA's approach to permit renewals that make no changes in facility operations and therefore also "do not involve actions related to

the stressors identified in the complaint." EPA's position appears to be that "renewals . . . that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged" can form the basis for a Title VI complaint and a full investigation by OCR. 65 Fed. Reg. at 39,677. Analytically, a renewal that does not alter existing levels of stressors is quite similar to a permit modification that involves administrative changes, because there is no change in the facility's operation that would create or contribute to a disparate impact in the community. Both categories of permit decisions "do not involve actions related to the stressors identified in the complaint" and so both should be treated in the same manner. Neither one should trigger an investigation or support a complaint or a finding of noncompliance.

In fact, allowing renewals to serve as trigger events for Title VI complaints is totally contrary to any notion of finality or certainty. It means that the same level of environmental performance established in the initial permit -- a level of performance that is presumably in compliance with all applicable environmental standards -- can be used over and over again as a "lightning rod" to investigate alleged disparate impacts.[10] The renewal permit by itself should not trigger a complaint or investigation, because nothing has changed at the renewing facility.

4. "Significant Emissions Decrease" Permits Are Properly Excluded in the Investigation Guidance.

Finally, the BNEJ supports EPA's decision in the Investigation Guidance to create a "safe harbor" for two related types of permit actions. The first type consists of permits that significantly decrease all emissions from a facility. The second type consists of permits that significantly decrease emissions of the "pollutants of concern," as specified by the complainant or as determined by EPA. In both cases, OCR will generally close the investigation.

The BNEJ endorses this limited "safe harbor" provision, which is a clear improvement over the 1998 Interim Guidance.[11] Not only will this "safe harbor"

10 Such repeated reviews are particularly inappropriate when the permit renewal continues to conform to applicable health and environmental protection benchmarks, such as those in the Clean Air Act ambient air quality regulations. As discussed in Section II.D. below, compliance with such benchmarks should preclude any Title VI concern; in such cases no adverse impact, disparate or otherwise, will be caused.

11 One aspect of this "safe harbor" requires clarification, however. The preamble discussion of this issue suggests that "[t]he decreases are measured based on actual, contemporaneous emissions from the facility being permitted." 65 Fed. Reg. at 39,677 (footnote omitted). Presumably, as EPA suggests in footnote

better focus OCR's limited resources, it will enable the siting and/or continued operation of facilities that provide lower emissions, as well as economic benefits, to the community.

C. The Investigation Guidance Should Screen Out Impacts and Stressors That Are Beyond the Recipient's Legal Authority.

Under the Investigation Guidance, the second step in the disparate adverse impact analysis is to determine which stressors and impacts should be evaluated, before determining which sources may contribute to those stressors and impacts. 65 Fed. Reg. at 39,678. This is a critically important aspect of the disparate adverse impact analysis, because it determines the scope and bounds of the entire investigation.

The BNEJ agrees strongly with EPA's decision to limit the investigation to those stressors and impacts that "are within the recipient's authority to consider, as defined by applicable laws and regulations." 65 Fed. Reg. at 39,678, 39,691. This is a major improvement over the 1998 Interim Guidance.

While EPA does not discuss in detail its rationale for adopting this limitation, one obvious reason is simple fairness to the recipient. It would be unfair if EPA were to base a finding of violation on disparate impacts, such as noise, odor, truck traffic, etc., that the recipient had no legal authority to address in its permitting process. EPA would effectively be punishing the state permitting agencies for "allowing" impacts that they actually had no legal authority to prevent or control. To put it another way, if the state agencies are legally obligated to issue permits to applicants that satisfy all applicable regulatory requirements, EPA would effectively be punishing the state agencies for properly conforming their actions to the limits of their authority under state law and delegated federal environmental programs. Thus, EPA's decision to limit its investigations to stressors and impacts that are within the recipient's authority makes good sense.

Unfortunately, certain language in the Investigation Guidance can be read to deprive this limitation of meaning. Specifically, OCR states that it will evaluate the recipient's authority in the broadest terms:

188, the decrease can be demonstrated by comparing the emissions limits found in the old permit and the new permit. In other words, the permittee should not be required to conduct additional monitoring to confirm that the decrease is "actual." A decrease in permitted emissions should suffice.

> ["Applicable laws and regulations"] could include laws and regulations that concern permitting programs and laws and regulations that involve broader, cross-cutting matters, such as state environmental policy acts. For example, a state statute might require all major state actions ... to take into consideration impacts resulting from noise and odors associated with the action. Even if these were not explicitly covered by the permitting program, they would appropriately be considered as part of the adverse disparate impact analysis, since the recipient has some obligation or authority concerning them.

65 Fed. Reg. at 39,678.

Thus, OCR is stating that so long as a state permitting agency has some obligation to consider noise, odor, and other impacts under its state statutes, then EPA will include such impacts in the Title VI disparate adverse impact analysis -- even if the state agency lacked any authority to address those impacts when it issued the permit that is the trigger for the Title VI complaint. This runs directly counter to the basic notion of fairness to the recipient, because EPA could well end up punishing the state agency for "allowing" impacts that it had no authority to prevent or control. It also invalidates EPA's decision to limit the scope of the investigation to impacts within the recipient's authority. Finally, given the difficulties associated with measuring noise, odor, and other similar impacts, OCR would confront intractable problems in assessing whether these impacts are "significantly adverse" for some subset of the affected population.

D. The Investigation Guidance Properly Limits the Analysis to "Significantly Adverse" Impacts.

An important positive feature of the Investigation Guidance is the explicit limitation of Title VI investigations to those impacts that are "significantly adverse"[12] because they exceed a recognized "significance level." 65 Fed. Reg. at 39,680. In EPA's words, "[I]f the impact is not significantly adverse, the allegation is not expected to form the basis of a finding of non-compliance with EPA's Title VI regulations and will likely be closed." Id.

12 Although there is no single definition of "significant" in this context, the BNEJ notes that it should not be confused with the "significance" analysis performed in the final step of the disparate adverse impact determination. 65 Fed. Reg. at 39,682. That analysis focuses in part on whether a difference is statistically "significant," as expressed in standard deviation units. That terminology should not be imported into the adverse impact determination, which is not statistical in nature.

This is a sound result that flows directly from EPA's recent decision in *Select Steel*,[13] which recognized that applicable environmental standards, such as the National Ambient Air Quality Standards, are presumed to provide adequate protection for all affected persons, absent specific evidence to the contrary. (*Select Steel* represents an important clarification of a point left implicit in the 1998 Interim Guidance.)

E. The Investigation Guidance Should Clarify How EPA Will Define the Population Affected by the Impacts or Stressors.

Under the Investigation Guidance, the fifth step in the disparate adverse impact analysis is to identify, and determine the characteristics of the affected population, which then provides a basis for comparison to an appropriate reference population. 65 Fed. Reg. at 39,681. This is an extremely important aspect of the disparate adverse impact analysis, because the ultimate issue will be whether the affected population differs significantly from the comparison population. Unfortunately, the Investigation Guidance fails to clarify how OCR will approach this vital task.

To identify the affected population, the Investigation Guidance states that "approaches based primarily on proximity may … be used where more detailed estimates cannot be developed." 65 Fed. Reg. at 39,681. This statement suggests that EPA will draw circles of various radii around the source(s) and then assumes that the population within the circles are somehow "affected" by air emissions or other impacts. This approach will leave the community, the recipient, and the permittee completely unable to predict the outcome. They have no way of knowing how large or how small the circles should be or will be. Nor do they have any way of telling how accurately any circles can reflect the realities of exposure, given that emissions are rarely distributed in circular patterns. There can be neither predictability nor certainty to EPA's investigations when no one knows in advance whether EPA will rely on proximity approaches and if so how EPA will determine the size of the circles.[14]

---

13 Letter from Ann E. Goode, Director, Office of Civil Rights, Re: EPA File No. 5R-98-R5 (Select Steel Complaint) to St. Francis Prayer Center and Michigan Department of Environmental Quality (Oct. 30, 1998).

14 A related problem arises from EPA's statement that the demographic composition of the affected population at the time the permit was originally issued may not be relevant. 65 Fed. Reg. at 39,697. The BNEJ believes that changes in the demographic composition of the community surrounding a facility are beyond the control of the recipient and the permittee, and so should be considered as part of the disparate adverse impact analysis.

In sum, the Investigation Guidance needs to include additional clarification as to how EPA will identify and evaluate the affected population for purposes of Title VI, to avoid defaulting to simple, unrealistic, and improper evaluations of the demographic distribution of impacts. EPA should build off of the work already performed by the FACA when seeking to clarify this issue. EPA's simple approaches to identifying the affected population described in the Investigation Guidance, moreover, make even more problematic EPA's suggested approaches to selecting the "appropriate" comparison population, the issue we address next.

F. The Investigation Guidance Should Clarify How EPA Will Select Appropriate Populations for Comparison.

Once the affected population has been identified, the next step in the process is for OCR to "compare the affected population to an appropriate comparison population" in order to assess potential disparate impacts. 65 Fed. Reg. at 39,681. The BNEJ wholeheartedly agrees with EPA's stated goal of selecting an "appropriate" comparison population. An appropriate comparison is required before concluding that any disparity in impacts provides an inference of discrimination, rather than reflects unequal results.

The Investigation Guidance speaks in the following very general terms about selecting as a comparison population "a reference area such as the recipient's jurisdiction (e.g., an air district, a state, an area of responsibility for a branch office), or an area defined by environmental criteria, such as an airshed or a watershed." 65 Fed. Reg. at 39,681. This passage suggests that the state as a whole, or an entire county, may be an appropriate population to compare to the affected population. Id. But this statement and others in the Investigation Guidance are too general and do not reflect the complexities involved in selecting an appropriate comparison population.

Broadly stated, the comparison population should have land use patterns similar to those of the affected population. More specifically, the comparison population should have a similar balance to the affected population of rural, urban, and suburban areas, with a similar range of residential, commercial, and industrial activities. The following example illustrates why similar land use patterns are important to assure a meaningful evaluation.

Consider a Title VI complaint alleging that a new industrial facility permit will expose local residents to VOC emissions that are both significantly adverse and disparate. If the affected population lives in an urban area where air quality is presently limited by ozone precursors from mobile sources, whereas the state as a whole is primarily characterized by suburban and rural land uses, then the BNEJ believes the state as a whole is not an "appropriate" comparison population.[15]

15 To say that the state as a whole is an "appropriate" comparison population would be tantamount to saying that Title VI forbids any significant disparities between any particular subset of the population and the population as a whole, regardless of the explanation for those disparities. Title VI does not do so, and particular local populations rarely reflect the precise demographic composition of the surrounding state.

Instead, OCR should select a comparison population with similar land use patterns.

EPA states in the Investigation Guidance that consideration of land use and zoning "would place an inappropriate focus on the siting of facilities" because their impacts may extend beyond the boundaries of zoned or designated land. 65 Fed. Reg. at 39,700. This statement does not take into account the fact that if an industrial facility is affecting an urban residential neighborhood, then it should be compared to a similar situation -- not to an isolated town without any nearby industrial sources.

Land use may be the only non-arbitrary method of determining an appropriate comparison population. For example, if the affected population is compared to the area of responsibility of the agency's branch office, the demographic comparison may yield dramatically different results than if the comparison is to an entire county or to the state as a whole. These differences will generally reflect the land use and demographic patterns within the state. The critical question for EPA is how to decide which comparison population is “appropriate,” given that apparent differences in disparities result from using differing geographic areas to determine the reference population. Yet, the Investigation Guidance disavows resort to land use to answer this question and provides no other answer.

This failure to explain how EPA will identify the appropriate comparison population in particular cases takes on even greater importance in light of the statement in the Investigation Guidance that "EPA generally would expect the risk or measure of potential adverse impact for affected and comparison populations to be similar under properly implemented [state environmental] programs, unless justification can be provided." 65 Fed. Reg. at 39,682. Here EPA seems to be saying two related things: First, absent unlawful discrimination on the part of the recipient, EPA would expect to find "similar" levels of risk everywhere within that state, regardless of where one looks. Second, where EPA finds major disparities in the distribution of risk, they are evidence of unlawful discrimination.

However, the meaning of this "expectation" and the support for it are not clear from the Investigation Guidance. The statement does not appear to be an empirical claim based on EPA's experience measuring risk levels in various parts of the country. Nor does it appear to be a predictive claim based on EPA's expert (but counter-intuitive) opinion that risk tends to be distributed uniformly even though population

is not. The BNEJ simply does not understand why EPA holds to this "expectation."

In sum, the lack of clarity and predictability on this pivotal issue makes the Investigation Guidance an unsound tool for deciding which disparate adverse impacts actually amount to "discrimination" that violates Title VI.

II. The Investigation Process Should Be Made Fairer to the Community, the Recipient, and the Permittee.

Putting aside the substantive issues raised by the Investigation Guidance -- most notably the problems relating to what amounts to "discrimination" under Title VI -- there are also a number of significant procedural issues. Simply stated, the Investigation Guidance outlines an investigative process that is needlessly unfair to the community, the recipient, and the permittee. The BNEJ recommends that the final Investigation Guidance should, among other things:

- require that complaints be filed by persons with a genuine stake in the community;
- recognize the role of the permittee in the investigation;
- require complainants to exhaust their administrative remedies in the permit process;
- require the use of data and analytic methods of acceptable quality;
- articulate a broader and more flexible view of justification;
- avoid using the "less discriminatory alternative" concept to undermine the scope of potential justifications;
- avoid encouraging "informal resolution" of Title VI complaints that may not have any merit in the first instance;
- clarify the timelines set forth for investigation and resolution of complaints; and

- require fairness in the remedy for any Title VI violation.

We address each of these issues in turn.

A. The Investigation Guidance Should Require that Complaints Be Filed By Persons With A Genuine Stake in the Community.

A significant concern of the BNEJ is that the Investigation Guidance does not limit the process to genuine and substantial complaints by requiring that the complainant be a person with a stake in the community. Under the literal language of the Investigation Guidance, an outside group with no members in a community could file a complaint about a local facility so long as the group has some members who belong to the same protected class (defined by race, color, or national origin) as those alleged to have been discriminated against.

EPA should acknowledge and deal with the problem of outside groups using environmental justice claims to achieve their own purposes and agendas. For example, in *In re Chemical Waste Management of Indiana, Inc.*, 1995 EPA App. LEXIS 25 (EAB June 29, 1995), the petitioners claimed that a landfill permit would have a disparate impact on African-American and low-income residents. The petitioners themselves, however, were white and affluent, and their claims were ultimately rejected on the merits. But allowing such parties to initiate claims in the first place is a waste of time and resources for everyone, including OCR.

The BNEJ strongly recommends that EPA remove the statement in the Investigation Guidance that allows "a person who is a member of a specific class of people that was allegedly discriminated against" to file a Title VI complaint even if that person does not allege any discrimination against him or her. At a minimum, EPA should provide an explanation and legal justification for granting standing to file complaints to persons who have suffered no discrimination themselves, but who purport to "represent" the victims of alleged discrimination.

B. The Investigation Guidance Should Involve the Permittee in the Process.

The investigation process described in the Investigation Guidance is for the most part silent regarding the role of the permittee. For example, Section II-B of the Investigation Guidance, which is entitled "Roles and Opportunities to Participate,"

discusses the role of the complainant and the role of the funding recipient, but it does not discuss the role of the permittee. 65 Fed. Reg. at 39,671-72.

Additionally, in its response to comments on the 1998 Interim Guidance, EPA states:

> The permittee may also be asked to provide information to assist in the investigation of the complaint. The recipient may wish to notify the permittee about the investigation . . . . During several investigations, permit applicants have sent information to OCR that they believe is relevant. In those instances, OCR has reviewed the information and placed it in the investigatory file.

65 Fed. Reg. at 39,693 (emphasis supplied).

Apparently this means that OCR will neither notify permittees of pending complaints nor require the recipients to do so. This falls far short of a workable process, given EPA's decision to develop guidance focused on individual permit actions rather than on state permitting programs.[16]

EPA should recognize that the permittee typically has a strong and legitimate interest in any proceedings relating to its facility. The issue need not be viewed solely in terms of whether a permit amounts to a legally protected property interest.[17] Instead, it can be viewed in terms of ensuring, as OCR's outreach effort did, that all persons with an interest in the proceedings are informed and afforded a reasonable opportunity to submit any information they believe may be useful. Clearly, there is a formal role for the permittee in this process and EPA should recognize such a role. Further, persons with an interest include many other parties than the complainant, EPA, the recipient, and the permittee. Thus, public notice should be provided by publication in the Federal Register, state register, and local newspapers to assure that all potentially affected stakeholders are notified.

---

16 Apart from advancing a legal argument that EPA is not required to involve permittees as a matter of due process, 65 Fed. Reg. at 39,698, EPA offers no explanation of its reasoning for not involving permittees in investigations relating to their facilities.

17 The BNEJ believes that operating permits and construction permits do confer legally protected property interests that trigger the procedural protections guaranteed by the due process clause. See BNEJ's May 6, 1998 Comments on the 1998 Interim Guidance at part III-C. The approach outlined in the Investigation Guidance does not appear to satisfy even minimal due process requirements.

The BNEJ strongly recommends that EPA require the recipient to notify the permittee of the filing of the complaint. Leaving it up to the recipient as to whether the permittee is even notified of the proceeding is inappropriate and EPA would likely be depriving itself of information that could play an important part in the investigation. The permittee will likely be in possession of the most up-to-date information about actual facility emissions, available pollution control technologies, the cost of installing them, and their technical practicability. In many cases, the recipient will rely upon the permittee to help defend the permit decision by providing information that helps demonstrate the lack of any significant disparate adverse impact, or that helps establish the justification for the impact.

The permittee's perspective may be particularly crucial in cases where a regulatory benchmark, rather than a risk level, is used to assess the facility's emissions. Regulatory limits on emissions are often established through a lengthy process that considers various margins of safety, impacts on sensitive sub-populations, and other complexities. In *Select Steel*,[18] for example, one critical fact was that the National Ambient Air Quality Standards were established to protect human health with an adequate margin of safety. The permittee will often have a unique appreciation of issues such as these from having participated in the standard-setting process. To leave the permittee uninvolved is to risk the loss of this potentially vital information.

Lastly, not requiring the recipient to notify the permittee of the complaint is simply not being fair to a stakeholder with a strong and legitimate interest in the proceeding. Permittees may be investing substantial amounts in facilities that may never be allowed to operate, and they obviously need to know that their permits are potentially at risk.

C. The Investigation Guidance Should Require Complainants to Exhaust Their Administrative Remedies During the Permit Process.

18 Letter from Ann E. Goode, Director, Office of Civil Rights, Re: EPA File No. 5R-98-R5 (Select Steel Complaint) to St. Francis Prayer Center and Michigan Department of Environmental Quality (Oct. 30, 1998).

Despite its "guiding principle" of seeking to prevent Title VI violations and complaints, 65 Fed. Reg. at 39,669, the Investigation Guidance does not require would-be Title VI complainants to exhaust their administrative remedies in the permit process. This is a serious flaw in the process outlined by OCR because it is much better for the community, the recipient, and the permittee if these issues are pursued to the greatest extent possible during the permit process.

EPA itself acknowledges the importance of having these issues pursued during the permit process, because EPA states that in deciding whether "good cause" exists to extend the 180-day deadline for filing a complaint, OCR will consider the extent to which the complainant raised its Title VI concerns during the permit process. "This will encourage complainants to exhaust administrative remedies available under the recipient's permit appeal process." 65 Fed. Reg. at 39,673.[19]

The BNEJ strongly recommends that EPA require would-be Title VI complainants to exhaust their administrative remedies in the permit process. Doing so will help avoid Title VI complaints in two ways. First, if the complainant achieves its objectives through the permit process, then there is no need to file a Title VI complaint. Second, if the complainant does not achieve its objectives, but the permitting agency considers and rejects the complainant's arguments, then the complainant may reconsider the merit of filing a Title VI complaint with OCR.

Even if a Title VI complaint is eventually filed, exhaustion helps insure that OCR will be presented with a well-developed factual record on which to base its decision-making. The recipient likely will not be required to gather new data, as the issue will already have been aired during the permit process. Additionally, the community, the recipient, and the permittee would all be guaranteed early awareness of the issues underlying the complaint, rather than dealing with a new set of issues when a complaint is filed up to 180 days after the permit is issued.

Nevertheless, the Investigation Guidance expresses the following concerns:

> Imposing a requirement that complainants use all of the recipient's available permit appeal processes prior to filing a Title VI complaint

19 Similarly, EPA explains that if "complaints alleging discriminatory effects from a permit are filed prior to the issuance of the permit, OCR expects to notify the complainant that the complaint is premature and dismiss the complaint without prejudice." 65 Fed. Reg. at 39,673. The BNEJ supports this approach. Moreover, this logic also favors requiring exhaustion of remedies in the permitting process.

> would be inconsistent with the structure of Title VI. Courts have held that those who believe they have been discriminated against in violation of Title VI or EPA's implementing regulations may challenge a recipient's alleged discriminatory act in court without exhausting their administrative remedies with EPA. In other words, Title VI does not require complainants to utilize the Federal administrative process, so it would seem inconsistent to require complainants to utilize state administrative processes. Nonetheless, as discussed above, OCR strongly encourages all parties to seek early resolution of their Title VI concerns.

65 Fed. Reg. at 39,694 (footnote omitted).

EPA's logic for not requiring exhaustion of state remedies is flawed in two respects. First, EPA wrongly suggests that the law is clear that Title VI plaintiffs may bring suit in federal court without exhausting their federal administrative remedies with EPA. EPA cites only a single court case for this proposition. The law on this issue is still developing, as illustrated by the Supreme Court's decision in June of 1998 to review a Third Circuit case holding that Title VI plaintiffs can sue in federal court. *Seif v. Chester Residents Concerned for Quality Living*, 118 S. Ct. 2296 (1998), *dismissed as moot*, 119 S. Ct. 22 (1998).

Second, even if EPA were correct regarding the law on exhaustion of federal remedies, that would not argue in favor of allowing Title VI complainants to bypass the state permit process. The rationale for not requiring exhaustion at the federal level is that the agency's Title VI investigation cannot provide the plaintiff with the relief he desires; all the agency can do is to terminate federal funding. This logic does not apply to the state permit process, which clearly can afford relief to the complainant. The state agency may deny, condition, or even revoke a permit, all in accordance with state substantive law and procedure.

In short, EPA has acknowledged the importance of exhaustion of state remedies and has tried to encourage such exhaustion, but has stopped short of requiring it. Because no persuasive reason exists not to require exhaustion, EPA should impose such a requirement in the final Investigation Guidance.[20]

20 EPA should also consider requiring potential claimants to attempt to resolve their concerns through the Community Relations Service established under Title X of the Civil Rights Act of 1964.

D. **The Investigation Guidance Should Require The Use of Data And Analytic Methods of Sufficient Quality to Support Findings of Violation.**

Although the Investigation Guidance expresses a preference for valid and reliable data, it also indicates a willingness to use other data -- data that do not meet these criteria -- in cases where good data are unavailable. This does a disservice to the permittee, the recipient, and the community, by allowing decisions to be made on the basis of information or analytic methods that may not be sufficient to justify the conclusions that will be drawn from the available data or that may not present an accurate picture of the actual situation.

This problem is most readily apparent in EPA's discussion of the "impact assessment" step in the disparate adverse impact analysis. The focus of this step is to "[d]etermine whether the activities of the permitted entity at issue, either alone or in combination with other relevant sources, may result in an adverse impact." 65 Fed. Reg. at 39,679. In other words, the critical issue here is individual or aggregate causation: Does the facility, either alone or in combination with other sources, actually cause a disparate adverse impact?

According to EPA, "[t]he facts and circumstances of each complaint will determine whether a likely causal link exists." Id. But in making those determinations, EPA recognizes that data may be inadequate and analytic methods may not be sound, but suggests anyway that the best available data be used simply to reach some conclusion. 65 Fed. Reg. at 39,679 ("In some situations, the data may be insurricient to perform an analysis."); id. ("OCR expects to use all readily available data in conducting its assessments."); see also Draft Recipient Guidance, 65 Fed. Reg. at 39,660 ("Generally, all readily available and relevant data should be used to conduct adverse impact assessments. Data may vary in completeness, reliability, and geographic relevance to the assessment area. You should evaluate available data and place the greatest weight on the most reliable data."). As EPA at one point recognizes, it should not perform analyses when the data or analytic methods are insufficient to assure that any conclusions to be drawn are valid.

For example, in numerous places, the Investigation Guidance states that EPA will decide causation in some cases based on information that falls far short of establishing any actual exposure mechanism. The Guidance, however, does not explain how EPA will assure that any proxy for an actual exposure that is evaluated

is the cause of a discriminatory disparate impact. For example, EPA states that it will consider "[t]he manufacture, use, or storage of quantities of pollutants, and their potential for release . . . ." Id. In other words, EPA will look at potential exposure scenarios and make various assumptions in order to use this information in support of overall findings about adverse impacts. But the "use" or "storage" of pollutants cannot be equated with actual releases or actual exposure. It would be highly inappropriate for EPA to evaluate the specifics of such "use" and "storage" in order to predict the likelihood of possible future releases. See *Fertilizer Institute v. United States EPA*, 935 F.2d 1303 (D.C. Cir. 1991) (even the broad CERCLA definition of "release" does not include storage). This kind of prediction should not be considered to support a finding of adverse impact that, if also disparate relevant to an appropriate comparison, would in turn support a prima facie case of a Title VI violation.

Similarly, the Investigation Guidance states that EPA will consider "potential exposures to stressors (e.g., facilities that are generally likely to use significant quantities of toxic chemicals which could be routinely or catastrophically released...)." Id. (emphasis supplied). This is one step further removed from actual data on actual exposure mechanisms. Instead, it focuses on emissions and exposures that have not taken place, but that might take place in the future under various circumstances. Calculations of potential exposures should not be used to support a finding of adverse impact that would in turn support a finding of violation.

The Investigation Guidance also is mistaken when it suggests that a mere increase in the permitted capacity of a landfill might be viewed as an adverse impact. 65 Fed. Reg. at 39,690. Depending upon the controls imposed in the permit, an expanded landfill might well represent a reduction in the potential impact on a community.

The point here is not that EPA must always have current pinpoint emissions monitoring data in order to draw any conclusions about releases and exposures from a facility. Estimates of emissions may be entirely appropriate where actual data are unavailable.[21] However, actual releases and actual exposures, not potential releases, should be the focus of any adverse impact determination. 65 Fed. Reg. at 39,675.

EPA recognized this same point in a somewhat different context when it properly rejected a commenter's suggestion that OCR make a finding of noncompliance

21 Because the permittee will often have the best information about releases from the facility, this is yet another reason why the permittee should be involved in the investigation from its inception.

whenever significant adverse health effects occur in close proximity to an industrial facility. 65 Fed. Reg. at 39,699. In EPA's words, this proposal was rejected because it "does not appear to require any [causal] link between the adverse health effects and the programs or activities of a recipient." Id. Just as EPA was right to insist on that causal link and to reject a proposal to abandon it, so EPA should insist on evidence of actual releases, rather than merely potential releases, in conducting a Title VI investigation.

Finally, despite EPA's stated preference for valid and reliable data, some of the databases and other potential sources discussed in the Investigation Guidance fall short of the mark. TRI reporting data, for example, are widely recognized as having built-in limitations due to the "one size fits all" rules that govern the way facilities must calculate or estimate their own data. The CERCLIS database maintained by the Superfund program is also known to have varying data quality among the EPA regional offices. It may not be possible to specify in advance in a guidance document which data sources will and will not be considered in all cases. But EPA should recognize that data from some of the most common databases may well be unsuitable for use in Title VI investigations because they are neither valid nor reliable.

E. The Investigation Guidance Takes An Overly Narrow View of Justification By the Recipient.

In two major improvements over the 1998 Interim Guidance, EPA has now (1) allowed recipients to demonstrate their justifications prior to any finding of noncompliance and (2) spelled out OCR's preliminary view of what justifications will be accepted for disparate adverse impacts that would otherwise constitute violations of Title VI. The BNEJ applauds EPA for providing these improvements and for providing this added discussion on such an important topic. However, the Investigation Guidance still takes what the BNEJ regards as an overly narrow view of justification. A broader view would be more appropriate.

The concept of justification originates from Title VII of the 1964 Civil Rights Act, which broadly prohibits discrimination in the terms or conditions of employment:

> In Title VII cases, courts have often concluded that business practices having disparate impacts are justified if a defendant can show that its decision to adopt the practice was motivated by significant cost savings, efficiency, or

safety considerations rather than discriminatory animus.

> Even though the EPA's Title VI regulations appear to prohibit any discriminatory practices; courts have generally interpreted Title VI implementing regulations to prohibit *unjustified* disparate impacts. Accordingly, courts in Title VI cases are likely to allow defendants to present justifications for their siting decisions similar to the business necessity justifications used in Title VII cases. Title VI cases suggest that defendants may be able to justify disparate impacts through safety or efficiency justifications, significant cost savings, or the unavailability of any physically suitable alternative sites.

Bradford C. Mank, *Title VI*, in The Law of Environmental Justice 39 (ABA 1999) (italics in original).

Despite this broad and flexible standard, EPA's Investigation Guidance takes a highly restrictive approach by requiring the recipient to "show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission." 65 Fed. Reg. at 39,683 (emphasis supplied).[22] The stringency of this standard can be seen by restating it in the negative: If the challenged activity were halted, the recipient would fail to meet a goal that is integral to its institutional mission. In other words, the challenged activity must be essential to the recipient's success as an institution, or it cannot serve as a justification under the Investigation Guidance.

This is a strained and unwarranted reading of Title VI. In the Title VII context, it would be comparable to saying that a business must show that without the challenged employment practice, the company would become unprofitable. The bar has never been set that high under Title VII, and should not be set so high under Title VI.

Moreover, EPA's discussion of how it would apply this very stringent standard suggests an overly narrow focus on the community where the permittee is located.

---

22 The Investigation Guidance incorrectly focuses on justification as applying to the issuance of a particular permit by the recipient. See, e.g., 65 Fed. Reg. at 39,683 (recipient may seek to justify "the decision to issue the permit"). Given EPA's recognition that individual permit decisions are rarely, if ever, the cause of or the solution for disparate adverse impacts, id. at 39,669, 39,683, the concept of justification should apply more broadly.

EPA states that "OCR expects to consider provision of public health or environmental benefits (e.g., waste water treatment plant) to the affected population from the permitting action to be an acceptable justification . . . ." 65 Fed. Reg. at 39,683.

The language quoted above suggests that EPA will consider health or environmental benefits as justification only to the extent that they are provided directly to the affected population. But many permitted industrial facilities provide important health and environmental benefits not only to their local communities, but also on a much broader basis. Consider the following examples:

- A petroleum refinery produces cleaner-burning gasoline that is marketed in several states and provides air quality benefits on a regional basis.

- A chemical plant manufactures chemicals used in drinking water treatment and purification systems around the country.

- An automobile assembly plant undergoes modifications needed to produce new cars whose lower emissions provide air quality benefits on a regional basis.

- A pharmaceutical plant produces prescription drugs used to fight infectious diseases throughout the country.

In each of these examples, the facilities provide substantial public health and/or environmental benefits not only to the local community, but also far beyond its boundaries. These benefits should be considered part of the recipient's justification of any disparate adverse impact. Yet it is unclear from the Investigation Guidance whether any of these would count under EPA's formulation of the test.

A related problem involves the use of justifications other than public health and environmental benefits. EPA states that "OCR would also likely consider broader interests, such as economic development, from the permitting action to be an acceptable justification, if the benefits are delivered directly to the affected population . . . ." 65 Fed. Reg. at 39,683 (emphasis supplied). Once again, the quoted language suggests an unnecessarily narrow focus.

Many industrial facilities provide substantial direct and indirect economic benefits to

the communities in which they operate. The direct benefits take various forms, including employment, tax revenues, production of goods, and the like. The indirect benefits may include enhanced community services, such as education and health care, as well as attraction of additional investment, and rehabilitation of blighted neighborhoods.[23]

Significantly, these economic benefits are not, and typically cannot be, provided directly or exclusively to the subset of the community that is most directly affected by whatever environmental impacts the facility may have. By their very nature, these benefits are distributed more broadly throughout the community.

EPA seems to be suggesting that these benefits cannot be considered justification for disparate adverse impact under Title VI. If so, then EPA is effectively saying that economic benefits will never be considered as justification under Title VI. That position that is difficult to reconcile with the Title VII case law, which gives substantial weight to economic considerations without analyzing how they are distributed within -- and beyond -- the local community.

Moreover, the BNEJ urges EPA not to lose sight of the fact that the permittee's circumstances, as well as those of the recipient, may form part of the justification for disparate impacts. For example, facilities engaged in extraction of natural resources, such as mining, often have little choice of where they can locate, because the location of the resources themselves is the decisive factor. In examining the alleged impacts from such facilities, and the justification for those impacts, OCR should take into account the lack of available alternative locations for the facilities.

Finally, the very complexity and ambiguity surrounding the concept of justification, coupled with EPA's decision to put the burden of proof on the recipients,[24] will pose a major challenge for the states. The states have limited resources, and EPA must recognize this in fashioning the ground rules by which justifications will be presented and evaluated.[25]

---

23 One serious unintended effect of the Investigation Guidance will be to promote urban sprawl by encouraging companies to build in "greenfields" locations instead of in urban areas.

24 EPA's decision to put the burden of proof on the recipient seems inconsistent with EPA's statements that Title VI investigations are not adversarial processes and that "it is OCR's job to investigate allegations and determine compliance." 65 Fed. Reg. at 39,672.

25 Some state permitting agencies lack sufficient resources to fully implement their own or delegated federal programs. Without additional resources, the additional burdens of addressing Title VI concerns

In sum, EPA should revisit the concept of justification and adopt a broader, more flexible standard that is more in keeping with the case law under both Title VI and Title VII.

F. The Investigation Guidance Puts Inappropriate Weight on the "Less Discriminatory Alternative" Test.

The Investigation Guidance concludes its discussion of justification by stating that even if adequate justification is presented by the recipient, "a justification may be rebutted if EPA determines that a less discriminatory alternative exists." 65 Fed. Reg. at 39,683. The BNEJ believes that EPA's treatment of the "less discriminatory alternative" concept in the Investigation Guidance puts far too much weight on a concept drawn from Title VII that should play a fairly limited role under Title VI.

EPA defines a less discriminatory alternative as "an approach that causes less disparate impact than the challenged practice, but is practicable and comparably effective in meeting the needs addressed by the challenged practice." Id. Unfortunately, EPA overlooks the fact that in the Title VII context, the "alternative" is one that could be selected and implemented by the employer. In the Title VI context, the "alternative" also must be one that could be selected and implemented by the recipient. This makes the "less discriminatory alternative" concept difficult to apply under Title VI.

For example, consider a new, state-of-the-art industrial facility in a minority neighborhood. A Title VI complaint is filed after the operating permit is issued. OCR finds that an disparate adverse impact exists due to the existing cumulative background levels of various pollutants. The recipient -- the state environmental regulatory agency -- points to the facility's environmental benefits as justification. EPA agrees that those benefits are substantial, but then it asks: Is there a less discriminatory alternative?

The BNEJ suggests that the answer should be "no." The new facility is not the cause of the existing cumulative background levels of pollution, and thus its impacts

---

may further degrade their programmatic capability. Similarly, the lack of resources may lead those states to perform inadequate Title VI analyses. To avoid these consequences, EPA should provide additional resources and expertise to states if EPA intends for them to address Title VI concerns as contemplated in the Investigation Guidance.

are not the cause of any discrimination that individuals may suffer.[26] Nevertheless, EPA states that "practicable mitigation measures ... could be considered as less discriminatory alternatives." 65 Fed. Reg. at 39,683. While it may be possible to make other improvements in the facility's environmental performance, doing so should not be deemed a "less discriminatory alternative" to the facility operations as permitted by the recipient. To require the permitted facility to shoulder a substantial burden of further reducing its emissions in order to redress existing environmental conditions that it did not create and to which it may not even appreciably contribute is patently unfair. This is particularly true when the mitigation measures are unlikely to remove or even to substantially ameliorate the existing, unequal conditions and the principal contributors to those conditions will not be subject to similar, imposed burdens.

Indeed, this is the problem with EPA's statement that "[p]racticable mitigation measures associated with the permitting action could be considered as less discriminatory alternatives . . . ." 65 Fed. Reg. at 39,683. If this is true, there will always be less discriminatory alternatives, and so there will never be a complete justification, because it is always theoretically possible to improve the performance of a facility. This would be a very harsh result, and the BNEJ believes it may not be at all what EPA intended. Without some clarification, the quoted statements in the Investigation Guidance are likely to create further confusion and uncertainty for the community, the recipient, and the permittee.

G. The Investigation Guidance Places Too Much Weight on Informal Resolution of Title VI Complaints.

The Investigation Guidance consistently emphasizes EPA's preference for informal resolution of Title VI complaints prior to a formal finding of noncompliance. 65 Fed. Reg. at 39,673-74. This preference may simply reflect the reality that most legal disputes are resolved through settlement, not through adjudication on the merits. Certainly, the BNEJ does not oppose settlement of disputes.

What is troubling about the Investigation Guidance as a whole, however, is that it seems to encourage the filing of Title VI complaints in the hope of bringing pressure to bear upon the recipient and the permittee, thereby paving the way for an "informal resolution" in which one or both of them make various concessions simply

26 Nor can the facility change the demographics of the community in which it operates.

to bring the dispute to a close. This very unfortunate set of incentives results from several aspects of EPA's process, including:

- The ability of persons without a genuine stake in the community to file complaints (see Section III-A above);

- The lack of predictability as to which disparate adverse impacts amount to violations of Title VI (see Section II above);

- The decision not to grant "due weight" to state permitting decisions except in some situations where area-specific agreements have been reached, 65 Fed. Reg. at 39,674-76;

- The very narrow approach to justification taken in the Investigation Guidance (see Section III-E above); and

- EPA's pointed reminder that complainants may seek, and recipients may agree to implement, "broader measures that are outside those matters ordinarily considered in the permitting process," 65 Fed. Reg. at 39,674.

The BNEJ is especially troubled that EPA would essentially invite state environmental permitting agencies to agree to implement "measures that are outside those matters ordinarily considered in the permitting process." The matters that state permitting agencies "ordinarily" consider in the permitting process are exactly those matters that state law and state regulations require the agencies to consider. EPA, by encouraging reliance on other factors "outside" those specified by state law, is not only encouraging the filing of Title VI complaints as a means of gaining leverage at the bargaining table, but is also unwittingly leading state permitting agencies into legal, fiscal, and political hot water if they accept EPA's invitation.

H. The Investigation Guidance Should Clarify and Shorten the Timelines Set Forth For Investigation and Resolution of Complaints.

The Investigation Guidance asserts that EPA will notify recipients of preliminary findings “within 180 days from the start of complaint investigation,” reiterating the timeframe provided in EPA’s existing regulation. 65 Fed. Reg. at 39,670, 39,695.

However, the Guidance does not clearly identify when an investigation must start. For example, there appear to be no time limits on how long EPA may allow efforts at reaching informal resolution before OCR begins its investigation of the complaint, and that investigation will not "start" until attempts at informal resolution have been completed. Specifically, the Investigation Guidance states:

> If a complaint is accepted for investigation, OCR will first attempt to resolve it informally. If informal resolution fails, OCR will conduct a factual investigation to determine whether the permit(s) at issue will create an adverse disparate impact or add to an adverse disparate impact . . . .

65 Fed. Reg. at 39,670 (footnote omitted).

The insertion of informal resolution into the process before the "start" of the investigation extends -- to well over a year -- the length of time that a permit may be at risk, because potential complainants have 180 days after the permit is issued to file a complaint and EPA then has 180 days to investigate. The 180-day requirement for EPA to complete its investigations has been honored more in the breach than in the observance. Further, the Investigation Guidance allows for filing of complaints more than 180-days after permit issuance, upon a showing of "good cause." To prevent this exception from becoming the rule, EPA needs to explain and to provide examples of the type of reasons that would constitute good cause.

It is imperative that EPA clarify when the 180-day clock for complaint investigation will "start," and that EPA actually conform to the schedule in its regulations. For example, EPA could establish a presumptive time limit, such as 60 days, on how long informal resolution should be pursued before OCR will "start" its investigation. Otherwise, a permittee may invest substantial resources in a particular facility (including an established facility receiving a renewal permit), only to have it unfairly rejected long after the fact.

I. The Investigation Guidance Should Require Fairness in the Remedy.

A final aspect of unfairness that permeates the Investigation Guidance involves the potential remedy for any finding of violation. Despite EPA's frequent acknowledgment that a single permitted facility is rarely the sole cause of an disparate adverse impact, there is no mention in the Investigation Guidance of how

the remedy for such an impact should be distributed among the various sources that contribute to it.

For all that appears, the complainant or the recipient could look to the facility that received the most recent permit to provide sufficient emissions reductions or offsets to address any impacts of concern, even though the facility in question contributed very little to those impacts in the first place. The BNEJ believes that EPA must commit itself strongly and explicitly within the Investigation Guidance to a rule of proportionality -- a facility that is a minor part of the problem should not be expected to bear a major share of the solution. This is really nothing more than simple fairness, but it is currently absent from the Investigation Guidance.

Similarly, OCR should recognize the same principle of fairness in cases where a Title VI complaint involves emissions that are covered by an area-specific agreement developed by the recipient. 65 Fed. Reg. at 39,675. Thus, if a particular facility is doing its part under the area-specific agreement that is acceptable to EPA, then that facility's permit should not be the subject of a Title VI complaint, even if other aspects of the agreement are not being implemented as quickly or completely as they should be. Again, the BNEJ urges EPA to commit itself explicitly to this concept of fairness in all aspects of its final Investigation Guidance.

CONCLUSION

The BNEJ supports the many substantial improvements in the Investigation Guidance from the 1998 Interim Guidance and commends EPA for the outreach, public participation, and stakeholder dialog effort that is reflected in the Investigation Guidance. In particular, the BNEJ supports the following decisions reflected in the Investigation Guidance:

- limiting precious investigative resources by seeking to address complaints triggered by permit actions that are most likely to have a disparate adverse impact;
- evaluating only those stressors and impacts that are within the permitting authority's power to prevent or control;
- considering for disparity analysis only adverse impacts that are significant;
- providing greater clarity regarding the process by which OCR will conduct its investigations; and
- requiring exhaustion of administrative remedies in the permit process.

Despite these improvements, the BNEJ has reluctantly concluded that the Investigation Guidance is still in need of substantial revision. It will not provide the predictability and certainty to which it aspires and which are absolutely essential for all stakeholders. The BNEJ respectfully suggests that EPA revise the Investigation Guidance as follows:

- further limit investigations to address state permitting programs rather than individual permit actions or, alternatively, to address only permit actions that authorize a significant net increase in emissions of concern that cause a significant adverse impact;
- further clarify the critical elements of how EPA will identify the affected population and the "appropriate" population for comparison;
- limit filing of complaints to persons with a genuine stake in the community;
- recognize the role of the permittee in the investigation;
- require the use of data and analytic methods of acceptable quality when evaluating complaints;
- articulate a broader and more flexible view of justification, and avoid the "less discriminatory alternative" approach to justification;
- avoid encouraging "informal resolution" of Title VI complaints that may not have any merit in the first instance;
- clarify the timelines set forth for investigation and resolution of complaints; and
- require fairness in the remedy for any Title VI violation.

These additional steps are needed to assure fairness and reasonable predictability in the Title VI process. The current Investigation Guidance provides inadequate consideration of the potential benefits of a project or permitted activity and of the disruption to business planning and state environmental regulatory programs that would result from its adoption.

The BNEJ is committed to working with the EPA, states, our host communities, and other stakeholders on environmental justice concerns. Our members are committed to the non-discrimination mandate of Title VI and seek to be responsible community members. The BNEJ hopes that these comments will provide an important contribution to the multi-stakeholder process EPA adopted to develop Title VI

guidance and will assist the Agency in its efforts to better implement its Title VI regulations.

Appendix A -- List of BNEJ Members Ascribing to These Comments

- Alabama Chemical Association
- Alliance of Automobile Manufacturers
- Alliance of Chemical Industries of New York State
- American Gas Association
- American Petroleum Institute
- The American Road and Transportation Association
- Chemical Industry Council of Illinois
- Chemical Industry Council of New Jersey
- Edison Electric Institute
- Massachusetts Chemical Technology Alliance
- Mississippi Manufacturers Association
- National Association of Manufacturers
- National Mining Association
- National Solid Waste Management Association
- Tennessee Association of Business
- Texas Chemical Council

ADDENDUM TO BNEJ TITLE VI COMMENTS

Appendix A – List of BNEJ Members Ascribing to These Comments

- Alabama Chemical Association
- Alliance of Automobile Manufacturers
- Alliance of Chemical Industries of New York State
- American Chemistry Council
- American Forest and Paper Association
- American Gas Association
- American Petroleum Institute
- The American Road and Transportation Association
- Chemical Industry Council of Illinois
- Chemical Industry Council of New Jersey
- Edison Electric Institute
- Massachusetts Chemical Technology Alliance
- Mississippi Manufacturers Association
- National Association of Manufacturers
- National Mining Association
- National Solid Waste Management Association
- Tennessee Association of Business
- Texas Chemical Council